IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 279

LEE-ROWAN COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Lee-Rowan Company, Petitioner, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Eighth Circuit in this case dated May 20, 1963, entered pursuant to opinion dated April 24, 1963.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A hereto) is reported at 316 F. 2d 209. The Decision and Order of the National Labor Relations Board enforced by the decree here under review (Case No. 14-CA-2653) appears at R. 7-14 and is reported in 137 N. L. R. B. No. 16. The Decision and Direction of Election of the Board in the representation case (No. 14-RC-3989) appears at R. 75-77.

The Decision and Order of the Board in the unfair labor practice case (No. 14-CA-2255) which preceded the representation case is reported in 129 N. L. R. B. 980, and appears as Appendix C to this petition.

JURISDICTION.

The decree sought to be reviewed (App. B hereto) is dated and was entered May 20, 1963. The opinion of the Court of Appeals (App. A) is dated and was entered April 24, 1963. A petition for rehearing, timely filed, was denied by the Court of Appeals May 24, 1963 (App. D). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1), and 29 U. S. C., § 160 (e).

QUESTIONS PRESENTED.

1. Are an unfair labor practice case against an employer and a later representation case so far, in essence, a single proceeding that the National Labor Relations Board, in determining whether certain employees are supervisors so as not to be eligible for inclusion in a bargaining unit, may in the representation case consider

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* References to the record as printed for the use of the Court of Appeals are as follows: "R." refers to the "Record" printed by the Board and "S. R." to the "Supplement to Record" printed by the present petitioner.

the evidence in the unfair labor practice case relating to the status of these employees and the inferences to be drawn from that evidence?

2. Where in an unfair labor practice case an employer was charged under § 8 (a) (1) of the National Labor Relations Act, with responsibility, among other things, for the acts of certain "line leaders," and the National Labor Relations Board in deciding that case made findings on the basis of which it concluded that the line leaders were supervisors within the meaning of § 2 (11) of the Act (which it regarded as a "subordinate issue" in that case), may the Board in a later representation case where the issue is whether the line leaders are eligible to be included in a bargaining unit and hence eligible to vote in a representation election, consider its findings in the unfair labor practice case as conclusive on the question of the status of the line leaders at that time, and confine its consideration of evidence in the representation case to looking for evidence of changed circumstances since the earlier case?

3. Where the question before the National Labor Relations Board is whether certain employees are mere "straw bosses" eligible for treatment as employees, or are supervisors within the meaning of § 2 (11) of the National Labor Relations Act so as to be ineligible for inclusion in a bargaining unit and not entitled to the benefits of any collective bargaining law, may the Board make its ultimate finding of supervisory status without making any finding on the basic question whether the exercise of the authority of the employees in question is "not of a merely routine or clerical nature, but requires the use of independent judgment," as required by § 2 (11)?

4. When a Court of Appeals reviews a case where the question is whether the National Labor Relations Board

has properly excluded certain employees from a bargaining unit on the ground that they are supervisors under § 2 (11) of the Act, must the Board's findings be upheld "no matter how convincing may be the argument that upon the evidence the findings should have been different" (App. A, p. 6a), or does the scope of review by the Court of Appeals require consideration whether the findings are supported by substantial evidence on the record considered as a whole?

5. When a Court of Appeals reviews a Labor Board decision excluding certain employees from a bargaining unit as supervisors (under § 2 (11) of the Act), should it treat the question of supervisory status as a question of mere fact, or as a question requiring the Court itself to construe the statute and to apply to the facts the statute as so construed?

STATUTES INVOLVED.

Section 2 (11) of the National Labor Relations Act as amended (49 Stat. 450; 61 Stat. 138), 29 U. S. C., § 152 (11), reads as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 10 (e) of the National Labor Relations Act as amended (49 Stat. 454; 61 Stat. 148), 29 U. S. C., § 160 (e), provides in part as follows:

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 14 (a) of the National Labor Relations Act as amended (49 Stat. 457; 61 Stat. 151), 29 U. S. C., § 164 (a), provides:

"(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Section 8 (a) of the National Labor Relations Act as amended (49 Stat. 452; 61 Stat. 140), 29 U. S. C., § 158 (a), provides in part as follows:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

STATEMENT OF THE CASE.

This case in the Court of Appeals is a proceeding under 29 U. S. C. § 160 (e) to enforce an order of the National Labor Relations Board. We shall state the case chronologically.

An unfair labor practice case charging domination (S. R. 73) of an alleged labor organization called the Lee-Rowan Shop Committee in violation of § 8 (a) (2) of the National Labor Relations Act and also charging interference (S. R. 73-74) with employees in organizing in violation of § 8 (a) (1), was filed, tried and decided against the present petitioner. 129 N. L. R. B. 980, App. C hereto.

The unfair labor practices were alleged to have been engaged in by "Respondent, by its officers, agents and representatives" (S. R. 73). Among the persons acting for the employer in the commission of unfair labor practices under § 8 (a) (1) were five named women who were "line leaders" (S. R. 72). The Trial Examiner (whose findings in this respect were adopted by the Board) found that whether the line leaders "are supervisors within the meaning of the act is a subordinate issue in the case" (App. C, p. 14a), and after reciting certain evidence (but nothing which purported to relate to the question whether the line leaders had authority the exercise of which "is not of a merely routine or clerical nature, but requires the use of independent judgment"), he found (App. C, p. 16a), "It is clear from all the evidence in the case that aforesaid line leaders in Respondent's plant are the representatives of management rather than production employees; and I find that they are supervisors within the meaning of Section 2 (11) of the Act."

Lee-Rowan's exceptions to the Trial Examiner's findings included no exception to the finding with respect to the status of the line leaders (S. R. 76-78).*

Following the unfair labor practice case the representation proceeding was started (Case No. 14-RC-3989). The only disputed issue (R. 24-25) in that case was whether seven line leaders and an inspector who spent part of his time as a line leader, two working foremen and the chief shipping clerk, were to be excluded from the unit of production and maintenance employees because "supervisors" within the meaning of §2 (11) of the Act. At the close of the evidence counsel for the Union moved (R. 68) "that the Board take jurisdictional notice in the findings in Case No. 14-CA-2255" (the previous unfair labor practice case). Counsel for the company said (R. 69): "We want to say that they ought to read the entire record, and we know they will come up with a different result, even on the old record."

The Board did not make findings on the basis of the evidence before it in the representation case. Most notably, it did not make any finding on the one essential issue in the case with regard to the status of the line leaders; i. e., as to whether they were or were not mere straw bosses—whether such authority as they had (and the evidence all came from the employer and was consistent and uncontradicted) was "not of a merely routine or clerical nature, but requires the use of independent judgment."

And the Board did not make (or purport to make) findings on the basis of the evidence in the representation case and the evidence in the earlier unfair labor practice case taken together. Instead, it started with the **findings**

* The 483 page typewritten transcript in the unfair labor practice case (No. 14-CA-2255) is being certified to this Court by the Clerk of the Court of Appeals. Very little of it relates to the question of the status of the line leaders and none of it was printed for the use of the Court of Appeals.

in the unfair labor practice case and disposed of the whole matter in a footnote. This footnote (R. 76-77) reads in full as follows:

> "The parties agree as to the composition of the unit, except that the Employer would include the 7 line leaders and the inspector, while the Petitioner would exclude them on the ground that they are supervisors within the meaning of the Act. The Employer employs 139 individuals in production and maintenance work, including the individuals whose unit placement is here involved. The production employees are divided into 7 groups with approximately 20 employees in each. Each line leader is in charge of a group. Line leaders are directly responsible to a shift foreman who in turn is supervised by the production foreman. In a recent case involving this Employer (129 NLRB No. 119), the Board found that the line leaders were supervisors. This finding was based on the facts that line leaders received 15 cents per hour more than the production employees; attended monthly meetings in the company of the foreman at which such matters as wages, production, and general working conditions were discussed; were given authority to and were expected to maintain discipline in their respective groups, and were authorized to recommend merit increases for production employees; and, were responsible for the performance of work schedules and the assignment of work to employees. In this proceeding, the Employer does not contend that the duties and responsibilities of line leaders have changed since the Board's earlier determination, but urges that the record in the earlier case was incomplete as to those duties and responsibilities. However, the record in the instant case indicates that the line leaders continue to possess supervisory duties and responsibilities previously found by the Board. Accordingly,

we find that the line leaders are supervisors within the meaning of the Act and we exclude them. See Knights of Columbus, 129 NLRB No. 11. With respect to the inspector, the record shows that she spends at least 20 percent of her time performing the duties of line leaders. In view of this fact, we find that the inspector is a supervisor and we exclude her. See Swift & Company, 129 NLRB No. 171.

"The parties agree and we find that the working toolroom foreman, the working maintenance foreman, and the chief shipping clerk, are not supervisors within the meaning of the Act and we shall include them."

An election having resulted in a union victory by a margin of 8 votes (with 8 ballots by the line leaders and inspector challenged and not counted), the Union was certified (R. 74), and to obtain judicial review the company refused to bargain. The present unfair labor practice case for violation of § 8 (a) (5) was therefore brought (Case No. 14-CA-2653).

The Intermediate Report of the Trial Examiner in this new case was adopted (R. 8) by the Board. The Examiner thus stated the contentions of the present petitioner (R. 11):

"As argued at the present hearing, Respondent's contention was that the status of the line leaders as supervisors was only a 'collateral and evidentiary issue' in the earlier unfair labor practice case; that the issue was not so litigated as 'to make it conclusive;' and that subsequently in its Decision and Direction of Election in the representation proceeding, the Board 'erroneously treated the decision in the unfair labor practice case as res judicata, that it went outside of the record in the certification case, to look at that case.' In its brief, however, the thread of the argument runs somewhat differently, i. e., that the

finding in the unfair labor practice case that the line leaders were supervisors was not essential to the decision in that case, and, therefore, whether those findings were correct or not, the Board could give them no conclusive effect, nor, indeed, **any weight at all** in the later representation proceeding." (Emphasis the Examiner's.)

After reviewing the earlier proceedings the Report proceeds as follows (R. 13-14):

> "We now reach the question whether supervisory status was effectively litigated in the earlier unfair labor practice case (129 NLRB 980) and whether the Board could properly note and give weight to its findings therein. Respondent admits in its brief to the present Examiner that the complaint in the earlier case alleged, and that its answer denied, that certain line leaders were supervisors within the meaning of the Act. The Trial Examiner in that case specifically noted in his report that one of the issues was whether the line leaders were supervisors, though he termed it a subordinate one (129 NLRB, at page 984). Furthermore, he then proceeded to make detailed findings on the issue (Id. at pp. 984-985), concluding with the following findings:
>
> > It is clear from all the evidence in the case that aforesaid line leaders in Respondent's plant are the representatives of management rather than production employees; and I find that they are supervisors within the meaning of Section 2 (11) of the Act.
>
> "The Trial Examiner thereupon found Respondent to be responsible for certain conduct which the line leaders had engaged in. On Respondent's exceptions, the Board adopted without modification the Trial Examiner's finding as to supervisory status.

"I therefore conclude and find, contrary to Respondent's contentions, that the status of the line leaders as supervisors was put directly in issue by the pleadings in the earlier case, which involved the same parties as the representation proceeding (as well as the same parties in the present case); that the issue was fully litigated; that the Trial Examiner's finding thereon formed the basis of his subsequent finding that Respondent had engaged, through the line leaders, in certain unfair labor practices; and that the Board could properly take official notice in the representation proceeding of its findings in the earlier case."

A refusal to bargain under § 8 (a) (5) was therefore found.

The Board thus upheld its own right to treat the findings it had made in the first unfair labor practice case as conclusively established by the prior decision as of the time as of which the prior decision spoke, so that it could proceed from that point and look only for evidence of change.* It also, inferentially, upheld its right not to consider additional facts, shown only by the new evidence, which might affect its ultimate conclusion.

The Board was upheld by the Court of Appeals. It held (App. A, p. 4a) that the first unfair labor practice case and the representation case were in essence one proceeding, so that evidence in the first proceeding could be considered in the second.**

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* We believe, based on the position taken by counsel for the Board in the Court of Appeals, that this right is exactly what the Board believes it ought to have. The disclaimer (footnote, R. 8) of treating the earlier decision as res judicata, simply means that the Board was willing to consider evidence of change; it does not mean that the Board was willing to take a fresh look.

** While it will, of course, not appear from the present record since the briefs in the Court of Appeals are not here, this point was not urged or even suggested—much less briefed—by either party in the Court of Appeals.

It therefore held (App. A, p. 5a) that the Board in the representation case "was not required to ignore the evidence" in the first unfair labor practice proceeding and "the inferences fairly to be drawn from such evidence." Evidently "inferences" refers to the findings of fact in the first case, which are the only part of the record in that case on which the Board purported to rely, and are what the Board in its decision in the present case claimed the right to give weight to (R. 13).

The Court went on then to lay down (App. A, p. 6a) pre-Universal Camera standards for its own review and (App. A, p. 6a) to treat the finding of supervisory status as a mere question of fact, rather than a question of applying a statutory standard to the facts.

And by clear implication (because it upholds orders of the Labor Board where this was not done) the Court of Appeals holds that it was not necessary for the Board, as a prerequisite to its conclusionary finding of supervisory status, to find the basic or primary fact—whether the admitted authority of these line leaders was such that the exercise thereof "is not of a merely routine or clerical nature but requires the use of independent judgment."

ARGUMENT.

1. As far as we can determine the decision of the Court of Appeals in this case is the only case holding that an unfair labor practice case and a later representation case are to be treated as one proceeding; indeed it appears to be the only case dealing with that point at all.

The importance of this in the administration of the National Labor Relations Act is obvious. Unfair labor practice proceedings frequently precede representation proceedings. Evidentiary issues—such as the question whether the line leaders in the case at bar were so related to the employer, by being "supervisors" or otherwise, that the employer should be held responsible for unfair labor practices committed by them—are likely to arise, the evidence on which will be material in a representation case. Is the right of an employee to be treated as such rather than as a supervisor to be left at the peril of what counsel in the unfair labor practice case may find it advisable to bring out in view of the issues in that case? Must counsel in examining or cross-examining witnesses in an unfair labor practice case be constantly looking ahead to the possible effect that testimony given may have in a later representation case which has not yet even been brought?

Ordinarily the admissibility, when offered, of evidence in a previous case between the same parties depends upon the lack of **availability** of the witness and the **identity of issues**. 31 **C. J. S., Evidence**, § 391, p. 1197, and § 389, p. 1195. The intent of Congress in establishing these two types of proceedings should also be considered. Certainly the Court of Appeals has misconstrued this Court's opinion in **N. L. R. B. v. Donnelly Garment Co.**, 330 U. S. 219, in holding that that case leads to any such result. There really was only one proceeding in the **Donnelly** case.

2. Can the National Labor Relations Board, having made findings on the subordinate issue of supervisory status in the first unfair labor practice case, take those findings as true and look only for evidence of change? That is what the Board did here. That is what it held, in substance (R. [illegible]), it had the right to do. And that is what the Court of Appeals has sustained it in doing.

The facts in this case so far as the duties of the line leaders are concerned are very similar to the facts in **Schwob Manufacturing Co.** (1960), 129 N. L. R. B. 815, where the Board held (in an unfair labor practice case) that the "section girls" there involved were not supervisors under § 2 (11) of the Act. We have never had any doubt that if the Labor Board would really decide the present case on the evidence, rather than starting with findings and looking only for evidence of change, it would find that the line leaders are mere straw bosses, entitled to the protection of the Act and to be included in the unit.

A process of alleged decision by the Board which amounts to a refusal to decide (absent evidence of change since the earlier unfair labor practice case), is, we submit, as important to the administration of the Act as was the decisional test reviewed and held erroneous by this Court in **N. L. R. B. v. Walton Manufacturing Co.**, 369 U. S. 404.

By giving effect to its earlier findings as establishing the facts found as of the time of the earlier case, the Board has run counter to the rule that even a judgment is conclusive in another case between the same parties only as to the ultimate facts, "one of those facts," to use Judge Hand's definition, "upon whose combined occurrence the law raises the duty or right in question." **The Evergreens v. Nunan** (2d Cir., 1944), 141 F. 2d 927. Other facts, though pleaded, denied, litigated and found, are not con-

cluded; they are variously called collateral, evidentiary, nonessential, etc. 30A **Am. Jur., Judgments,** §§ 375-379. **U. S. Fidelity and Guaranty Co. v. McCarthy** (8th Cir. 1929), 33 F. 2d 7. **Restatement of Judgments,** § 68, and comments. **Restatement of Judgments, 1948 Supplement,** comments to § 68. **Karamheros v. Luther** (1938), 279 N. Y. 87, 17 N. E. 2d 779. The modern law on this subject starts with **The Duchess of Kingston's Case** (1776), 3 Smith's Leading Cas. (9th Am. Ed.) 1998, 20 How. St. Tr. (Eng.) 355. Cf. **Yates v. United States,** 354 U. S. 298, 335 on "Collateral Estoppel."

See also **N. L. R. B. v. Southern Airways Co.** (5th Cir. 1961), 290 F. 2d 519, where the Fifth Circuit held, in the converse situation to the case at bar, that a finding that certain "dock chiefs" were supervisors made in a representation case, was not conclusive in a later unfair labor practice case.

3. Can the Labor Board decide whether employees are straw bosses or statutory supervisors, without finding the basic facts which make the difference? That is the great trouble with the present case; the Board (being filled with the notion that it was being asked to decide the same thing twice and that it shouldn't have to do so) did not make any finding at all on the principal determinative question: whether the authority was routine or required the exercise of independent judgment.

This practice the Court of Appeals has tolerated. We cited in our brief in the Court of Appeals **Florida v. U. S.,** 282 U. S. 194, 215, and **City of Yonkers v. U. S.,** 320 U. S. 685, for the proposition that basic findings and not mere conclusionary findings are required. We cited in our petition for rehearing a case which we submit is squarely in point, **N. L. R. B. v. Capital Transit Co.** (D. C. Cir. 1955), 221 F. 2d 864, where the Board had certified a bargaining

unit, including inspectors who the company claimed were supervisors and the Court refused enforcement of the order to bargain, not for lack of evidence to support the argument made in the Board's brief but for lack of findings.

4. With the utmost respect for the Court of Appeals we think it little short of amazing that this long after **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474, a Court of Appeals should express the scope of its review in terms of conclusiveness of the Board's findings "no matter how convincing may be the argument that upon the evidence the findings should have been different" (App. A, p. 6a). The decision is contrary to **Snow v. N. L. R. B.** (9th Cir. 1952), 308 F. 2d 687, 691, where the Ninth Circuit held: "But unlike the rule which obtains on the review of the sufficiency of the evidence to support a jury verdict, the substantiality of the evidence in support of Board findings 'must take into account whatever in the record fairly detracts from its weight.' Universal Camera Corporation v. N. L. R. B., 340 U. S. 474, 488."

It is also contrary to previous leading cases by the Eighth Circuit itself such as **Local No. 3 v. N. L. R. B.** (8th Cir., 1954), 210 F. 2d 325, 330, cert. den. 348 U. S. 822: "Since the decision of the Supreme Court in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence, and if it is our duty to consider it then we must pass upon its weight." **Farmers Co-operative Co. v. N. L. R. B.** (8th Cir., 1953), 208 F. 2d 296, where following a full discussion of the Universal Camera case the Court held (l. c. 303): "Since it is the duty of this court to determine insofar as is humanly possible what the truth is (Universal Camera Corp. v. National Labor Relations Board, supra), we have read the entire record

with that duty in mind and can reach no conclusion other than that the Examiner and the Board erred in finding and holding that Mr. Thomas, manager, and Mr. Porter, plant superintendent, lied when they testified in reference to Mr. Dudley's conduct on March 7, 1952."

5. Finally, the Court of Appeals treats the question of supervisory status within § 2 (11), as one of mere fact (App. A, p. 6a). Such a holding would permit the Board to reach different results on substantially identical evidence without any possibility of judicial review. (It has in fact done just that in deciding **Schwob Manufacturing Co.** (1960), 129 N. L. R. B. 815, one way and the case at bar the other). We submit that the application of § 2 (11), albeit contemplating an initial decision by the Board, requires a judicial determination of the scope and applicability of the statute—that the courts, as usual, and not the Board alone, have their responsibility for the determination of the intent of Congress. Other courts in reviewing decisions on supervisory status have proceeded in this way, and have not treated the matter as presenting non-reviewable questions of fact. For examples (there are plenty of others), see **N. L. R. B. v. North Carolina Granite Corp.** (4th Cir. 1953), 201 F. 2d 469, **N. L. R. B. v. Fullerton Publishing Co.** (9th Cir. 1960), 283 F. 2d 545, and **Precision Fabricators, Inc., v. N. L. R. B.** (2d Cir. 1953), 204 F. 2d 567.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,112.

National Labor Relations Board, Petitioner,
vs.
Lee-Rowan Company, Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

[April 24, 1963.]

Before SANBORN and BLACKMUN, Circuit Judges, and STEPHENSON, District Judge.

SANBORN, Circuit Judge.

The National Labor Relations Board has petitioned this Court, under § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e), for enforcement of its order of May 16, 1962, issued against Lee-Rowan Company, a manufacturer of metal fixtures and products in St. Louis, Missouri, engaged in interstate commerce. The order is based upon a finding that the respondent had, in violation of § 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), refused to bargain with the Union[1] which the Board on November 3, 1961, had certified to be the bargaining repre-

[1] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 1012, AFL-CIO.

sentative for a designated unit of the respondent's production and maintenance employees at its plant. The order requires the respondent to cease refusing to bargain with the Union, and to bargain with it.

The respondent challenges the validity of the order on the ground that eight of its employees were wrongfully excluded from the unit found to be appropriate for the purpose of collective bargaining. Seven of these employees were called "line leaders" and one was called "inspector". The Union contended that they were "supervisors" as defined in § 2(11) of the Act (29 U.S.C. § 152(11)).[2] The respondent contended that the employees in question were not "supervisors" and could not rightfully be excluded from the unit.

The order in suit is the culmination of a series of proceedings before the Board, extending over several years, growing out of the efforts of the Union to organize the respondent's production workers at its plant in St. Louis.

First there was the unfair labor practice case known as No. 14-CA-2255, tried before a Trial Examiner of the Board in March of 1960, decided by the Board December 20, 1960, and reported in 129 N.L.R.B. 980. In that case the respondent was found to have violated § 8(a)(2) and 8(a)(1) of the Act by dominating and interfering with the formation and administration of "the Lee-Rowan Shop Committee," and also to have violated § 8(a)(1) in interfering with its employees in the exercise of their rights to self-organization guaranteed in § 7 of the Act, by inter-

[2] Section 2(11) of the Act, 29 U.S.C. §152(11) provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

rogation, threats, and surveillance with respect to their organizational activities. The Board determined that the line leaders were "supervisors" and that they had engaged in some of the anti-union activities of the respondent. Respondent was ordered by the Board to cease and desist from the unfair labor practices it was found to have committed.

The second case in the series, Case No. 14-RC-3989, was initiated by a petition of the Union filed with the Board on February 6, 1961, for certification as the bargaining representative for a unit consisting of the respondent's production and maintenance employees, excluding supervisors as defined in the Act. At the hearing on the petition in this representation case, the Union contended that the seven "line leaders" and the one "inspector" among the respondent's employees were supervisors and should be excluded from the unit to be represented. The respondent insisted that they were not supervisors and should not be excluded from the unit. It introduced evidence to support its position. Counsel for the Union cross-examined the respondent's witnesses. At the conclusion of the evidence, he moved "that the Board take jurisdictional notice in the findings in Case No. 14-CA-2255 in respect to this petitioner and this company." The Trial Examiner stated that the motion would be referred to the Board. Counsel for the respondent replied: "We want to say that they ought to read the entire record, and we know they will come up with a different result, even on the old record." The "old record" is the record in the first case (No. 14-CA-2255).

On July 7, 1961, the Board issued its Decision and Direction of Election in the representation case, determining that the "line leaders", who had been found by the Board to be "supervisors" in the unfair labor practice case on December 20, 1960, were still "supervisors" and,

together with the "inspector", should be excluded from the unit found by the board to be appropriate for bargaining purposes.

At the election directed and conducted by the Board on August 7, 1961, 146 votes were cast; 73 were for the Union; 65 were against it; and 8 ballots—those of the line leaders and the inspector—were challenged and not counted. The Regional Director of the Board investigated the matter of the challenges, and on September 1, 1961, recommended, in a report to the Board, that the challenges be sustained, and that the Union, having received a majority of the qualified votes, be certified as the representative of the employees designated by the Board as the appropriate unit. The Union was so certified.

The last of the series of proceedings resulted in the order now under consideration. (Case No. 14-CA-2653, 137 N.L.R.B. No. 16.) Only by refusing, as it did, to bargain with the Union, could the respondent secure a judicial determination of the validity of the Board's certification of the Union. Had the challenged ballots been counted, the Union might not have had a majority and would not be entitled to certification.

The respondent contends that enforcement of the Board's order should be denied because (1) it is not based solely on the evidence in the representation case, (2) it gives effect to findings in the first unfair labor practice case, and (3) the authority of the "line leaders" was of a routine nature and did not require the use of independent judgment.

These several proceedings before the Board followed each other in logical sequence. They occurred during the Union's campaign to organize respondent's plant. They constituted, in effect, one continuing controversy between the Union and the respondent. The Board, in determining, in the representation proceeding, whether the "line

leaders", were supervisors, as they had been found to be in the first unfair labor practice proceeding, was not required to ignore the evidence in that proceeding relative to the status of the "line leaders" and the inferences fairly to be drawn from such evidence. Cf. *N. L. R. B.* v. *Epstein*, 3 Cir., 203 F.2d 482, 485.

The Supreme Court, in *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U.S. 219, in reversing this Court for refusing to enforce an order of the Board, pointed out, on page 227, that "there are significant differences between the relations of an appellate court to a lower court and those of a court to a law-enforcing agency, like the Board, whose order is subject only to restricted judicial review." The order of the Board in the *Donnelly Garment Co.* case was based upon a second hearing before an Examiner of the Board who this Court believed had not complied with its directions on remand. The Supreme Court said (page 225 of 330 U.S.): "This second hearing was not a new proceeding. It was a stage in a process consisting of the first proceeding before the Board, the remand resulting from review of the Board's order in the Circuit Court of Appeals, and the second proceeding before the Board in response to this remand." The case, in that regard, bears some resemblance to the instant case. After the remand from the Supreme Court and a rehearing, this Court ordered enforcement of the Board's order, *Donnelly Garment Co.* v. *N. L. R. B.*, 8 Cir., 165 F.2d 940. We said (page 942): "Our conclusion is that, even if the Board has reached erroneous conclusions as to the facts, its findings, or at least enough of them to sustain its order, have a sufficient evidentiary basis to be binding upon this Court." We also quoted the following from our decision in *N. L. R. B.* v. *May Department Stores Co.*, 162 F.2d 247, 249 (certiorari denied 332 U.S. 808):

"* * * Whatever mistakes the Board may make in appraising the credibility of witnesses and the weight

of evidence, and in drawing inferences from conflicting or circumstantial evidence, are errors of fact which, like similar errors committed by a jury, are not subject to correction on review. * * * The findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different."

See also: *Robinson* v. *Railroad Retirement Board*, 8 Cir., 184 F.2d 703, 705; *N. L. R. B.* v. *Minnesota Mining & Manufacturing Co.*, 8 Cir., 179 F.2d 323, 325-326; *N. L. R. B.* v. *Solo Cup Company*, 8 Cir., 237 F.2d 521, 522-523. Cf. *Northwest Bancorporation* v. *Board of Governors of Federal Reserve System*, 8 Cir., 303 F.2d 832, 840-841; *N. L. R. B.* v. *Hamilton Plastic Molding Co.*, 6 Cir., 312 F.2d 723.

The findings of the Board with respect to the status of the eight employees who were not included in the designated bargaining unit and whose votes were not counted at the election in the representation proceeding, cannot be said to be entirely lacking in adequate evidentiary support or without "warrant in the record". *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131. If the Board erred, as the respondent insists that it did, in deciding that these employees were supervisors within the meaning of the Act, the error was, in our opinion, an error of fact and not subject to correction by this Court.

The petition of the Board for enforcement of its order is granted.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

National Labor Relations Board,
Petitioner,
v.
No. 17112.
Lee-Rowan Company,
Respondent.

Decree.

Before: Sanborn and Blackmun, Circuit Judges, and Stephenson, District Judge.

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent on May 16, 1962. The Court heard argument of respective counsel on March 14, 1963, and has considered the briefs and transcript of record filed in this cause. On April 24, 1963 the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Eighth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Lee-Rowan Company, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

Dated: May 20th, 1963.

APPENDIX C.

Lee-Rowan Manufacturing Company and Lodge 1012, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and Lee-Rowan Shop Committee (Party in Interest). Case No. 14-CA-2255. December 20, 1960.

DECISION AND ORDER.

On July 20, 1960, Trial Examiner Lee J. Best issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications.

We agree with the Trial Examiner that by dominating and interfering with the formation and administration of the Lee-Rowan Shop Committee, and by contributing sup-

port to it, Respondent violated Section 8 (a) (2) and (1) of the Act.[1]

We also agree with the Trial Examiner that Respondent independently violated Section 8 (a) (1) of the Act. We rely upon the following incidents:

(1) Respondent President Lee's speech to employees en masse on December 18, 1959 (a) to the effect that he would not let a union come into the plant, even though it would require him to move out of the St. Louis area; (b) his proposal to establish a shop committee in lieu of union representation to meet with management officials for the purpose of discussing working conditions and to present the problems and grievances of employees to the Respondent; and (c) his statement that if a union came in, the Company "would take our profit sharing from us," and that the employees would no longer have certain "company policies and benefits" which President Lee discussed.

(2) Surveillance of a union meeting at the American Legion hall on January 13, 1960, by Respondent's general manager, Robert Luerding, and Line Leaders Isabelle Goewert, Hildegarde Voss, and Eunah Buergin.

(3) Statement by Line Leader Faye McGowan to employee Betty Giddens in December 1959, that she would not be surprised if Respondent moved the plant.

(4) Interrogation of employee John Colbert by Foreman Matthew Fillman with respect to his attendance at a union meeting on December 20, 1959.

(5) Statement by Foreman Matthew Fillman to employee Paul Jones in January 1960, to the effect that General Manager Luerding wanted to see him because he had been a "bad boy"; and thereupon escorted Jones to the

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[1] See *Frank R. Cook Co., a Subsidiary of Telecomputing Corporation*, 126 NLRB 805; *N. L. R. B. v. Cabot Carbon Company, et al.*, 360 U. S. 203.

conference room for interrogation concerning his union activities.

(6) Interrogation of employee Paul Jones concerning his union activities by General Manager Luerding in the early part of January 1960.

(7) Interrogation of employees Opal Jones and Paul Jones by President Lee and General Manager Luerding in the plant office on or about January 18, 1960, concerning their activities on behalf of the Union, and offering to assist Paul Jones to obtain employment elsewhere if he was dissatisfied with his job with the Respondent.

(8) Interrogation of employee Opal Jones by Line Leader Dorothy Kelly on or about January 21, 1960, concerning attendance at a union meeting, in the course of which she made a statement to the effect that the only thing to worry about was the plant being moved if the Respondent was not able to pay the higher wages demanded by the Union.

(9) Interrogation of employees Lewis Cox and Everett Shoults by President Lee in January 1960 concerning their interest in the Union in the course of which Lee told them that Respondent would be forced to hire more experienced workers than those now employed in the plant, and suggested that employees could settle their problems to better advantage through the Shop Committee instead of having an outside union represent them.

(10) Interrogation of employee Lewis Cox by Line Leader Lorraine Rutherford on January 21, 1960, concerning his attendance at a union meeting.

ORDER.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby

orders that the Respondent, Lee-Rowan Manufacturing Company, St. Louis, Missouri, its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Surveillance of its employees with respect to their organizational activities and union meetings, and interrogation of its employees in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1).

(b) Threatening its employees with economic reprisals to discourage membership in or concerted activities on behalf of Lodge 1012, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and any other labor organization.

(c) Dominating or interfering with the formation and administration of, or contributing financial or other support to the Lee-Rowan Shop Committee or to any other labor organization.

(d) Recognizing or dealing with the Lee-Rowan Shop Committee, or any successor thereto, as a representative of any of its employees for the purpose of negotiating or bargaining with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist Lodge 1012, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may

be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from, and completely disestablish, the Lee-Rowan Shop Committee as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

(b) Post immediately in its plant at St. Louis, Missouri, copies of the notice attached to the Intermediate Report marked "Appendix."[2] Copies of such notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fourteenth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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2 This notice is amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

INTERMEDIATE REPORT AND RECOMMENDED ORDER.

Statement of the Case.

These proceedings, with all parties represented, were heard before the duly designated Trial Examiner at St. Louis, Missouri, on March 22, 23, and 24, 1960, upon a complaint and notice of hearing filed by the General Counsel of the National Labor Relations Board and answer thereto filed by Lee-Rowan Manufacturing Company, herein called the Respondent or Respondent Employer. The principal issues litigated were:

(1) Whether the Respondent Employer in violation of Section 8 (a) (1) of the Act interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, by interrogation, threats, and surveillance with respect to their organizational activities.

(2) Whether Respondent dominated or interfered with the formation or administration of a labor organization (herein called Lee-Rowan Shop Committee) or contributed financial or other support to it in violation of Section 8 (a) (2) of the Act.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues involved, to argue orally upon the record, and to file written briefs including proposed findings of fact and conclusions of law. Written brief untimely filed by the Respondent has by agreement of all other parties been given due consideration. None were filed by counsel for the General Counsel or other interested parties.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings and Conclusions.

I. Business of Respondent Employer.

Lee-Rowan Manufacturing Company is a Missouri corporation organized in 1939, maintaining its principal office, manufacturing plant, and place of business in St. Louis, Missouri, where it is engaged in the fabrication and wholesale distribution of metal and wire products, including various types of metal closet accessories such as garment hangers, trouser creasers, sweater dryers, shoe racks, blouse hangers, etc. It presently operates on 2 shifts employing a maximum total of approximately 160 people of which approximately two-thirds work on the day shift and one-third on the night shift. During December 1959 through January 1960, the working force of production and maintenance employees consisted of 75 to 80 women and 15 to 20 men. Female production employees were divided into incentive groups, each under a line leader, there being five such groups on the day shift from 8 a. m. to 4:30 p. m., and one on the night shift from 5 p. m. to 1:30 a. m. Their work consists primarily of operating and servicing machines such as wire-bending machines, punch presses, etc., and is not an assembly line operation.

Supervisors of the Respondent Employer admittedly include Desmond Lee (president of the corporation), Robert Luerding (general manager), Matthew Fillman (day foreman), and Robert Howery (night foreman). Whether or not aforesaid line leaders in charge of incentive production groups are supervisors within the meaning of the act is a subordinate issue in the case.

In the course and conduct of its business Respondent annually ships from its plant in St. Louis to points outside the State of Missouri products valued in excess of $50,000. I find therefore, and it is admitted, that Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. Labor Organization Involved.

Lodge 1012, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, is a labor organization within the meaning of Section 2 (5) of the Act. Whether or not the Lee-Rowan Shop Committee, named as an interested party herein, is such an organization will be determined, *infra*, by the Trial Examiner.

III. The Unfair Labor Practices.

A. The line leader system.

Each working shift in Respondent's plant operates under the supervision of a general foreman, who is accountable to the general manager, who in turn is held responsible by corporate officials for the overall operation of the plant. Practically all maintenance employees are men working directly under the supervision of the shift foreman. Production employees are women divided into incentive groups, each under the supervision of a line leader, who directs the work and reports to the general foreman concerning the efficiency of operations. The line leaders perform both productive work and administrative duties, receive a premium wage of 15 cents per hour above the production wage rate, and also share in any incentive bonus paid to production workers in excess of the base rate. Each incentive group consists of approximately 15 or more female production workers. The line leaders are responsible for performance of a daily work schedule submitted by the plant office, procure necessary raw materials, and assign specific work to individual employees. They supervise and train production employees in the performance of their work, and submit to management individual performance records. They must be familiar with the operation of all machines, and call for maintenance service thereon whenever required. They have

authority to and are expected to maintain discipline within their respective groups, and are authorized to recommend merit increases in pay for individual employees. They report to the foreman when necessary or required to do so. Employees are encouraged and expected, insofar as possible, to submit their problems and complaints to the line leader. In past years the Respondent has made a practice of holding monthly meetings with its line leaders and foremen for the discussion of general working conditions, rates of pay, production, or anything else pertaining to the job. At such meetings the line leaders reported any complaints from production workers, and would report back to the complainant any action taken thereon by management. Recently the administration duties of line leaders have been greatly augmented by expansion in the number of items manufactured by the Respondent and the increased number of employees placed under their supervision. Consequently these line leaders have had less time to personally perform production work, and Respondent has held such meetings at infrequent intervals to discuss the problems of the individual employees.

It is clear from all the evidence in the case that aforesaid line leaders in Respondent's plant are the representatives of management rather than production employees; and I find that they are supervisors within the meaning of Section 2(11) of the Act.

B. Interference, restraint, and coercion.

In the early part of December, 1959, it became known to the Respondent that some outside labor union, later identified as the Boilermakers, was trying to organize its employees. Several days prior to Christmas 1959, Line Leader Faye McGowan told Betty Giddens (welder) that a union representative was soliciting the girls at their homes to sign cards, and inquired whether she knew anything about it. This line leader expressed the hope that

the Union did not get in, because she would not be surprised if they moved the factory.

According to the schedule Respondent was preparing to close down its plant for the yearend holidays on Tuesday, December 22, 1959, and hold a meeting of all employees on that date in the lunchroom cafeteria. By reason of his expected absence on Tuesday to visit Respondent's New York office, President Desmond Lee changed the date of meeting to Friday, December 18, 1959. Thereat, President Lee made a speech in which he discussed the Union at great length.

Maxine Fleeman (punchpress operator) credibly testified in substance that President Lee said in his speech that: He had called the meeting because of rumors in the plant; for 22 years there had been no union in the plant; they had gotten along fine, and he would be "damned" if he would let a union come in and run his business; they didn't know anything about it; many industries in the St. Louis area were moving to smaller towns because a union was forcing them to pay wages higher than they could afford; he did not have any plans for moving the factory, but "who knows what the future holds"; "You get a bear in the corner and he will fight, and I am in the corner"; and directly after the holidays he intended to hold a meeting and elect a shop committee called a grievance committee, the employees could elect leaders for this committee, go to them with any problem they might go to a union with, and the Company would do everything in its power to correct it.

Lillian Horrel (punchpress operator) credibly testified in substance that President Lee said he had heard rumors about a union in the plant and wanted to talk about it; that the Company had been there 22 years without a union; that he would not let a union come in if he had to move out of town; that after the holidays they were going

to have a grievance committee and try to settle all differences in the plant without the help of a union; that if the union got in they "would take our profit sharing away from us"; and that "when we came back to work in January we would have another meeting, and elect the girls for a grievance committee."

Betty Giddens (welder) credibly testified that President Lee made statements to the effect that the Company was planning to expand during 1960 and build a plating plant to provide more jobs and job security, but that he would move the plant elsewhere if he was forced to do so.

Mable Kuhn (dip machine operator) credibly testified in substance that President Lee discussed company policies and benefits that could not be provided by the Union and stated that "we would not have them any longer if the Union came in"; that he would "go with us all the way if we wanted a union," but said "I am of the nature if anyone fights me, I fight back"; that he thought it would be "nice for us" to have a shop committee; and that after the first of the year we could have a meeting and elect the people for the shop committee from the employee groups to discuss working conditions and reach some agreement and better understanding and see what they could do to "please us."

General Manager Robert Luerding testified in substance that President Lee discussed plans and policies of the Company, inroads of competition, changes in fringe benefits to employees; said that he had been aware of union activities for the past week or 10 days, but did not know the identity of the Union, and had not been approached by any union representative, and told the employees that it was a union that by nature could know nothing about our business; that the Company had done well for more than 20 years without a union, and could continue to operate better, offer more to employees, create steadier

work, and in general make it a better place to work without a union; that President Lee did not say he would move out if the plant was organized or that fringe benefits or the profit-sharing plan would stop, but did say that the Company had prided itself for years on its close friendly relationship with employees, and that such relationship could hardly continue if the people were represented by an organized labor union; that it would be a great loss to lose that personal touch, and he would much rather deal directly with the employees himself than through some outside agent; that he had personal knowledge of organizations operating with shop committees, and that such a committee might do good at Lee-Rowan Company; and that he wanted everybody to think about it, and after the holidays try to get it set up and operating as quickly as possible, if it was what everybody wanted. In the course of his testimony, Mr. Luerding admitted that, after learning that a union meeting was to be held at the American Legion hall on the night of January 13, 1960, he discussed the subject with Line Leader Goewert and told her he thought it would be a good thing if she went to the meeting; that he told both line leaders and production workers that: "If everybody is going to be required to vote, you'd better find out what the union has to offer"; that he also drove past the meeting place to see whether there was a crowd there, and made a mental note of the automobiles, because he was interested to see who was interested in the union meetings; and that on the next day following the meeting Line Leader Goewert gave him the names of people she had seen there.

President Desmond Lee testified in substance that he first learned about the union activities early in December; that he changed the date of meeting with employees to December 18, 1959, because he expected to be called to the New York office on business; that in addressing the employees he said there had been a whispering campaign

about a heavy goods union, and reviewed the disadvantages of employees joining any union and losing their personal relationship with the Company, the spirit of teamwork, and a certain degree of individuality; that he stressed the fact there had never been a strike in the plant; that the Union would make unreasonable demands which could not be met on a competitive basis, and might cause a strike with loss of time and wages; that employees were enjoying the benefits common to the industry and were working without payment of dues, fees, assessments, or fines; that they could solve their own problems better without payment of dues, fees, assessments, or fines; that they could solve their own problems better without having a third outside party whose primary interest was obtaining dues and fees from the individual employees; that many competitors were paying substantially less wages than the Company was paying; that they had plans to expand in 1960, and have a plating plant to provide more jobs and job security; that he reviewed present benefits such as seven paid holidays, death benefits, liberal vacations, a fine insurance program, profit sharing, retirement plan, etc.; that under the law, employees could join a union, but if the Union forced them to meet unreasonable demands that they would have to seek a competitive labor market, but did not say what or how they would do so; that they had no present plans to move the plant, but had been advised not to invest in further plant facilities at St. Louis, Missouri, if the plant became unionized and had placed on employees unreasonable featherbedding practices, which they could not competitively meet; that for a number of years the line leaders had successfully carried on a liaison between employees and management, but that times had changed, and that he now questioned whether that system was working effectively; that the employees might welcome an opportunity to improve their relationship with management by participating in and electing

representatives on a shop committee, and could think about it pending further discussion after the holidays; and that he outlined the general nature and purpose of such a committee to be the discussion of working conditions, and to bring gripes and complaints before the management.

Following the speech of President Desmond Lee, Respondent by and through its supervisors sought to obtain information with respect to the sympathies and affiliation of individual employees with the organizational activities. To accomplish this objective certain supervisors engaged in surveillance of union meetings and interrogated employees concerning their attendance and participation therein.

John Colbert (general shop worker) credibly testified without contradiction that on December 21, 1959, Foreman Matthew Fillman came to his place of work in the plant and inquired whether or not he had attended a union meeting on the preceding night, but also said "Don't tell me anything if you don't want to." Thereupon, Colbert admitted that he had attended such a meeting at the American Legion hall on Olive Street Road on the night of December 20, 1959.

Line Leader Isabelle Goewert (who was later discharged on February 19, 1960) credibly testified in substance that in December, 1959, President Lee told her that he had heard about the Union trying to organize, and that he was not worried about it, but if it got too hot he would have to move out; that General Manager Robert Luerding said he had an idea that a team of man and wife was passing out union cards for the Boilermakers, and was going to find out; that Luerding instructed her to check with the girls and report to him who was interested in the Union; that in January, President Lee inquired whether she knew how many of the girls were interested

and signed up with the Union; and that General Manager Luerding requested her to attend a union meeting scheduled to be held at the American Legion hall on the night of January 13, 1960. Thereafter, at approximately 7:45 p. m. on January 13, 1960, Line Leaders Isabelle Goewert, Hildegarde Voss and Eunah Buergin together in a borrowed automobile parked in an open lot opposite the entrance to the American Legion hall and recorded the names of recognizable employees entering therein; and on the next day she (Goewert) gave these names to General Manager Luerding at his office in the plant in the presence of Foreman Matthew Fillman. At that time Luerding exhibited a paper on which he had himself recorded the license numbers of automobiles parked at the meeting place that night, and inquired whether she (Goewert) knew who drove a certain two-tone Pontiac car to the union meeting.[3]

In the early part of January, 1960, Foreman Matthew Fillman approached Paul Jones (employee), and said, "You have been a bad boy. Luerding wants to see you." Thereupon, the foreman escorted Jones to a conference room in the plant where General Manager Luerding was waiting to see him. Luerding began the conversation by inquiring whether Jones was dissatisfied with his job. Jones denied being dissatisfied, and inquired whether Luerding was referring to the union activities. Luerding said, "I don't want to talk union to you . . . I have heard that you did work for a union." Thereupon, Jones told Luerding that he had once been a member of Local 688 and had organized a picket line in Tulsa, Oklahoma. Luerding suggested that if Jones was dissatisfied, he could take a few days off and find a new job. Jones

[3] The testimony of Line Leader Goewert is corroborated by that of General Manager Luerding and his admission of participation in this surveillance.

insisted that he was not dissatisfied but related that the line leaders had been causing some dissatisfaction in the plant by crediting to themselves production work not actually performed, and thereby decreasing the incentive bonus paid to other employees. Thereafter, on January 18, 1960, President Lee approached Opal Jones (wife of Paul Jones) at work in the plant, and inquired what she thought about the talk going around in the plant. Opal Jones appeared distressed, and inquired if he was preparing to discharge her husband. Lee denied any such intention, and suggested that Mrs. Jones with her husband come to his office at 2:30 p. m. for a further discussion. General Manager Luerding was also notified to be present. At the following conference, President Lee in substance said he thought it best to talk to both of them, because they were dissatisfied, and he had heard that they were being paid to work for the Union. Paul Jones denied such rumors, but admitted that he had signed a card, and was interested in the Union because he wanted to make more money, so that his wife would not have to work, and could stay at home with their five children. Lee told Jones that he could not expect to earn additional pay equal to his wife's earnings, even if there was a union in the plant, and agreed to give him a good recommendation if he could find a better job. General Manager Luerding complimented the work of both Paul Jones and his wife, asserted that the Company was expanding, and told them there would be a good opportunity for a better job later on.

On or about January 21, 1960, Line Leader Dorothy Kelly approached Opal Jones at work in the plant, and said:

> Well, I hear that the Union has the majority. If they have, I am going to get out and look for me another job. We will have to look for another job, because they will move or shut down.

In the course of this conversation, Line Leader Kelly admittedly inquired of Opal Jones whether she attended a union meeting, and what the Union offered. Opal Jones replied: "Well, if you are interested, I can send the man out to see you"; but Mrs. Kelly told her not to send anyone to her house, and that she would make contact herself, if interested. When Opal Jones expressed apprehension of losing her job, Mrs. Kelly told her the only thing to worry about was the plant being forced to move, because the Company would not be able to pay the higher wages demanded by the Union and remain competitive.

It is admitted by the Respondent that during the month of January, 1960, President Lee interviewed maintenance men Lewis Cox and Everett Shoults, inquired how they felt about the Union, why the employees wanted a union in the plant, expressed his views on the subject by reviewing the advantages being given by the Company to its employees without union dues, fees, and assessments, and made a statement to the effect that if required to pay higher wages he would have to hire more experienced people than those now working in the plant. On or about January 21, 1960, Line Leader Lorraine Rutherford inquired of Lewis Cox, maintenance man, whether he had attended a certain union meeting, how many people were present, and what he thought about it.

C. Assistance and domination of a labor organization.

Following the Christmas and New Year holidays, operations at Respondent's plant were resumed on January 4, 1960. Before the close of their respective shifts on that date all employees were notified to attend a meeting in the cafeteria at 4:15 p. m. on Tuesday, January 5, 1960. Employees scheduled to work on the night shift were instructed to report early and received pay for the extra

time entailed thereby. The meeting was convened by and presided over by General Manager Robert Luerding, who had a blackboard available and announced procedure to elect a shop committee. Luerding announced that this committee would consist of two members to be elected by the day shift, one member to be elected by the night shift, and two members to be elected by male employees of the maintenance department irrespective of shift on which employed, thereby providing separate representation for each of these units as a two-way line of communication between management and employees. Thereupon, he called for nominations from the floor by respective units, and recorded the names of proposed candidates on the blackboard. When nominations were closed, he submitted a proposal to mimeograph the ballots overnight, and conduct an election by secret ballot on the following day. Separate ballots for each unit were thereafter mimeographed by a stenographer in the plant office, and distributed to individual employees as they reported for work on Wednesday, January 6, 1960, by Paymaster Brammeyer, who maintained a checklist of the voters. A ballot box was set up at a central location for each shift wherein each employee was authorized and instructed to cast a vote for nominees of his or her choice. Tellers from each shift were appointed by supervisors of the Respondent to count and record the vote on their respective shifts, which was done in the presence of General Manager Luerding and Foreman Fillman. Following the count, all ballots and tally sheets were delivered to Luerding, who published the results there on the plant bulletin board the next day. The same general procedure was followed in conducting the election on each shift. Thereby, five members of the Lee-Rowan Shop Committee were elected, but at a preliminary meeting with management on January 7, 1960, it was decided to enlarge the membership by electing a representative from each incentive group on

the day shift not already represented by the election of two members from that shift. Thereupon, General Manager Luerding distributed necessary additional ballots and instructed line leaders in charge of the trouser creaser group, the shoe keeper group, and the punchpress group to hold special elections and elect a representative for each of those incentive groups or departments prior to 3:30 p. m. on that date. Thereupon, unsuccessful candidates appearing on the day-shift ballots of the preceding day were again voted on to represent their respective incentive groups, and after election within each group became additional members of the shop committee, thereby increasing total membership to eight members consisting of a representative from each incentive group, one representative from the night shift, and one representative for men in the maintenance department.

The first general meeting of the shop committee (eight members) was held at 3:30 p. m. on January 7, 1960, in the office of President Desmond Lee, who opened the meeting, outlined the purposes of the committee, and extended his congratulations and approval of the installation. By unanimous consent General Manager Robert Luerding was drafted and elected *viva voce* to be the permanent chairman and moderator of the Lee-Rowan Shop Committee. Thereupon, Chairman Luerding presented and distributed for discussion previously prepared copies of procedural rules by which the shop committee was to be governed. After discussion and decision to make minor changes in the proposed rules, the meeting adjourned to reconvene on the next day.

The second general meeting of the shop committee was held in the office of President Desmond Lee at 3:30 p. m. on January 8, 1960, with General Manager Luerding presiding. At that time he presented revised copies of pro-

cedural rules, which were unanimously adopted, as follows:[2]

Lee-Rowan Shop Committee.

1. The Purpose of this Committee will be to meet periodically with representatives of the Management of the Company to discuss conditions and practices of employment.

2. The Membership of this Committee will be composed of two male and six female employees. All hourly paid factory employees will be eligible for membership on the Committee. The two male members will be elected by a vote of all eligible male employees. One female member will represent each of the line leader groups and will be elected by a majority vote of the employees in that group. Elections will be held during the month of December and each group shall select its member(s) and alternate(s).

All Committee members will hold office for a period of one year and may be re-elected. Members will take office in the regular January meeting.

If a Committee member should leave the employ of the Company for any reason, or be placed on leave of absence, the alternate member shall fulfill the unexpired term.

3. The Meetings of this committee with management representatives shall be held monthly on the afternoon of the first Wednesday of the month, at 3:30 p. m.

In the event a special meeting is deemed necessary by mutual agreement of any member and the General Manager of the Company, the time for such meeting will be scheduled by them.

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[2] All subsequent meetings of this committee have been held in the office of President Lee following the procedure outlined therein.

4. The Procedures to be followed by this Committee shall be as outlined in the following paragraph:

Any employee who has a question, problem, suggestion, or complaint concerning working conditions or policies shall notify the committee member representing his or her group of the situation. The committee member shall be responsible for reporting the matter to the entire Committee and Management in detail at a regular meeting. The Committee will then consider the matter in light of all pertinent facts and attempt to arrive at an amicable decision. It shall be the responsibility of the member who presented the case to report back to the original employee.

In the event any matter is of extreme urgency, it shall be considered at a special meeting, set in accordance with Section 3 above.

Concluding Findings.

From the foregoing testimony of witnesses, including admissions of Respondent, and the entire record in the case, I conclude and find that the Respondent Employer interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by the following conduct:

(1) Statements made by President Desmond Lee to employees en masse on December 18, 1959, to the effect (a) that he would not let a union come into Respondent's plant, even though it would require him to move out of the St. Louis area; (b) that the Company was planning to expand and build a plating plant to provide job security and more jobs in 1960, but, having been advised not to invest in further facilities at St. Louis, Missouri, if the plant became unionized, would seek a more competi-

tive labor market elsewhere and hire employees with more experience and greater skills than those currently employed by the Respondent; (c) that if a union came in, employees would no longer have the advantages and benefits now afforded by the Company, because they would be subject to negotiations with the Union, and being like a bear in the corner he would fight anyone that fights him.

(2) The proposal of President Desmond Lee at the meeting on December 18, 1959, to establish a shop committee in lieu of union representation to meet with management officials for the purpose of discussing working conditions and to present the problems and grievances of employees to the Respondent Employer.

(3) Instructions by General Manager Robert Luerding to Isabelle Goewert and other line leaders to obtain information by interrogating employees, attending union meetings, and to report who was interested in the union organization.

(4) Surveillance of a union meeting at the American Legion hall on January 13, 1960, by General Manager Luerding and Line Leaders Isabelle Goewert, Hildegarde Voss, and Emnah Buergin.

(5) Statement by Line Leader Faye McGowan to Betty Giddens (employee) in December 1959 that she would not be surprised if Respondent moved the plant.

(6) Interrogation of John Colbert (employee) by Foreman Matthew Fillman with respect to his attendance at a union meeting on December 20, 1959.

(7) Statement by Foreman Matthew Fillman to Paul Jones (employee) in January 1960 to the effect that General Manager Luerding wanted to see him because he had been a bad boy; and thereupon escorted Jones to the con-

ference room for interrogation concerning his union activities.

(8) Interrogation of Paul Jones (employee) concerning his union activities by General Manager Robert Luerding in the early part of January 1960.

(9) Interrogation of Opal Jones (employee) and husband, Paul Jones by President Desmond Lee and General Manager Robert Luerding in the office on or about January 18, 1960, concerning their activities on behalf of the Union, and offering to assist Paul Jones to obtain employment elsewhere if he was dissatisfied with his job with the Respondent.

(10) Interrogation of Opal Jones (employee) by line Leader Dorothy Kelly on or about January 21, 1960, concerning attendance at a union meeting, and making a statement to the effect that the only thing to worry about was the plant being moved if the Company was not able to pay the higher wages demanded by the Union.

(11) Interrogation of Lewis Cox and Everett Shoults (employees) by President Desmond Lee in January 1960 concerning their interest in the Union; telling them that Respondent would be forced to hire more experienced workers than those now employed in the plant; and suggesting that employees could to better advantage settle their problems through the Shop Committee instead of having an outside union to represent them.

(12) Interrogation of Lewis Cox (employee) by Line Leader Lorraine Rutherford on January 21, 1960, concerning his attendance at a union meeting.

From the record in this case it is clear that the foregoing conduct of supervisors followed a definite and deliberate pattern of interference, restraint, and coercion

designed and calculated by the Respondent to discourage and frustrate the organizational efforts of its employees in selecting a bargaining representative of their own choosing by democratic process, and to restrict such efforts and processes to the acceptance and establishment of an employee representation committee or plan subject to supervision and control of the employer, but, nevertheless, for the purpose of dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, and working conditions in general.

I find, therefore, that the Lee-Rowan Shop Committee proposed by the Respondent and eventually established in its plant was and is a labor organization within the meaning of Section 2 (5) of the Act.

From the undisputed testimony and entire record in the case, I find that by and through the conduct of President Desmond Lee, General Manager Robert Luerding, and other supervisors the Respondent dominated and interfered with the formation and administration of a labor organization (Lee-Rowan Shop Committee) and contributed financial and other support to it, as follows:

(1) By President Desmond Lee proposing to employees en masse at the meeting on December 18, 1959, to establish a shop or grievance committee according to a plan previously initiated and formulated by the Respondent Employer.

(2) By General Manager Robert Luerding, during working hours on company premises, calling and presiding over a meeting of employees on January 5, 1960, to determine the composition of, and nominate candidates for membership on, aforesaid Shop Committee.

(3) By General Manager Robert Luerding on January 6, 1960, supervising and directing the preparation and distribution of ballots, setting up the polling places, and

conducting the election of the Shop Committee during working hours on company premises, appointing the tellers to canvass and count the ballots, and announcing the election results.

(4) By General Manager Robert Luerding on January 7, 1960, participating in a decision with members-elect of the Shop Committee to enlarge its membership by electing three additional members from incentive groups not already represented thereon; and thereafter supervising and directing through line leader supervisors of the Respondent the aforesaid three additional members from the trouser creaser group, shoe keeper group, and punch-press group, respectively

(5) By President Desmond Lee calling and presiding over the first general meeting of the Lee-Rowan Shop Committee (eight members) in his office on January 7, 1960, to outline the purposes of the organization and extend his congratulations and approval of its installation in the plant.

(6) By General Manager Robert Luerding on January 7, 1960, assuming and accepting the position of chairman and moderator, and thereupon proposing for adoption in writing a body of procedural rules prepared in advance by the Respondent for the government of this organization.

(7) By General Manager Robert Luerding, presiding at the second general meeting of the Lee-Rowan Shop Committee in the office of President Desmond Lee, and presenting his redrafted rules of procedure, which were unanimously adopted.

In addition to the foregoing conduct of Respondent initiating, proposing, conducting the nomination and election of members thereof, formulating and proposing its

rules of government and procedure, the Respondent has presided over all subsequent meetings of the Lee-Rowan Shop Committee always held during working hours in the office of the President Desmond Lee with the members receiving full wages for their services thereon. All expenses of the organization itself, if any, have been paid by the Respondent, since the Shop Committee has no treasury, officers, or facilities of its own to carry on the administration thereof, other than that provided by the Respondent Employer. I am convinced and find, therefore, that the Lee-Rowan Shop Committee is a creature of the Respondent Employer and does not adequately represent its employees as a collective-bargaining representative of their own free choice. In short, I find that the Lee-Rowan Shop Committee is being used by Respondent as a substitute for collective bargaining, and as such is a device initiated, sponsored, formed, dominated, supported, and administered by the Employer in the form of a labor organization in violation of Section 8 (a) (2) and (1) of the Act, thereby interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.[3]

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[3] See: *Frank R. Cook Co., a Subsidiary of Telecomputing Corporation*, 120 NLRB 805.

V. The Remedy.

Having found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (a) (1) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Finding that the support, control, and domination of the Lee-Rowan Shop Committee by the Respondent, is a continuing obstacle and frustration to the exercise by its employees of the rights guaranteed in Section 7 of the Act, and in order to effectuate the policies of the Act by freeing the employees from the effects of all unfair labor practices of the Respondent found herein, I shall recommend that Respondent withdraw all recognition from that organization as a representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and to completely disestablish it as such representative.

The unfair labor practices found to have been engaged in by the Respondent are of such a character and scope that, in order to insure the employees herein involved their full rights as guaranteed in the Act, I shall recommend that Respondent cease and desist from in any manner interfering with, restraining, and coercing its employees in their right to self-organization.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Lodge 1012, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, and the Lee-Rowan Shop Committee are labor

organizations within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By dominating and interfering with the formation and administration of the Lee-Rowan Shop Committee, and by contributing support to it, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For The Eighth Circuit.

No. 17112 — September Term, 1962.

National Labor Relations Board, Petitioner, vs. Lee-Rowan Company.	On Petition for Enforcement of Order of National Labor Relations Board.

Petition of respondent for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 24, 1963.

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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1953

LEE-HOWARD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

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LEE-ROWAN COMPANY, PETITIONER

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–6a) is reported at 316 F. 2d 209. The Board's decision and order (R. 7–14)[1] are reported at 137 NLRB 187.

JURISDICTION

The decision of the court of appeals was entered on April 24, 1963 (Pet. 1a–6a), and its decree was entered on May 20, 1963 (Pet. 7a). A petition for rehearing was denied on May 24, 1963 (Pet. 36a). The petition

[1] References to the record as printed for the use of the court of appeals are as follows: "R." refers to the "Record" printed by the Board and "S.R." to the "Supplement to Record" printed by the petitioner.

for a writ of certiorari was filed on July 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board, in determining the supervisory status of the Company's line leaders, properly considered its findings on the same issue in an earlier unfair labor practice case involving the same parties.

2. Whether the Board properly concluded that the Company's line leaders were "supervisors" rather than "employees" within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 4–5 of the petition. Also relevant is 2(3) of the Act, which reads as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include * * * any individual employed as a supervisor * * *.

STATEMENT

On February 6, 1961, the Union[2] filed with the Board a petition for certification as bargaining representative for a unit composed of all production and maintenance employees—excluding office clericals, professionals, guards and supervisors as defined in the Act—at the Company's St. Louis plant (S.R. 16–20). At the hearing on this petition on March 15, 1961, the Company contended, contrary to the Union, that its seven line leaders and one inspector should be included in the unit as employees, rather than "supervisors" as defined in Section 2(11) of the Act (R. 24).[3] The Company was given a full opportunity to, and did, introduce evidence in support of its position, and its witnesses were subject to cross-examination by counsel for the Union (R. 25–69, S.R. 22–76). At the end of the hearing, Union counsel moved that the Board take official notice of its findings in Board Case No. 14–CA–2255, decided three months earlier, wherein the supervisory status of the Company's line leaders had also been litigated (R. 68).[4] The Com-

[2] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 1012, AFL-CIO.

[3] At the time of the representation hearing, there was also a dispute over the supervisory status of "two working foremen, * * * and one chief shipping clerk" (R. 24–25). After the record was closed and transmitted to the Board for consideration, however, it was agreed that these three individuals should be included in the unit (R. 77, n.).

[4] In that case, instituted by charges filed by the Union, the Board had found that the Company restrained and coerced its employees in violation of Section 8(a)(1), and fostered a company union in violation of Section 8(a)(2). Some of the

pany's attorney offered no objection, although he asserted that the Trial Examiner in the earlier proceeding had asked "leading conclusionary questions." The Company's attorney urged the Board to read the entire record in the earlier case, expressing confidence that it would "come up with a different result [regarding the line leaders], even on the old record" (R. 69).

On July 7, 1961, the Board issued its Decision and Direction of Election (R. 75–77). It detailed the facts on which it had found in Case No. 14–CA–2255 that the line leaders were supervisors, and noted that the Company "does not contend that the duties and responsibilities have changed since the Board's earlier determination, but urges that the record in the earlier case was incomplete as to those duties and responsibilities." The Board then added: "However, the record in the instant case indicates that the line leaders continue to possess supervisory duties and responsibilities previously found by the Board. Accordingly, we find that the line leaders are supervisors within the meaning of the Act and we exclude them" from the unit (R. 76–77, fn. 2). The Board further concluded that the inspector should also be excluded from the unit, since "the record shows that she spends at least 20 percent of her time performing the duties of line leader" (*Ibid.*).

An election was held on August 7, 1961. Seventy-three votes were cast for the Union, sixty-five against, and the line leaders and inspector cast ballots which

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acts of unlawful restraint and coercion were committed by the line leaders, and the Board, finding that they were supervisors, held the company responsible for their actions. *Lee-Rowan Company*, 129 NLRB 980; Pet. 8a–35a.

were challenged by the Union (R. 73; S.R. 66–67). The Regional Director conducted an investigation of the challenged ballots. Finding "that the duties, responsibilities and authority of the line leaders and the inspector have not changed between the date of the hearing and the date of the election" and that the "employer raised no issues not previously considered by the Board," he recommended that the Board sustain the Union's challenges and certify it as the representative of the employees in the appropriate unit (S.R. 66–68). The Company filed exceptions to the Regional Director's Report, again contending that the line leaders and the inspector should be included in the unit (S.R. 68–71). On November 3, 1961, the Board adopted the Regional Director's recommendations sustaining the challenges to the ballots cast by the line leaders and the inspector, and certified the Union as the employees' exclusive bargaining representative (R. 73–75).

Thereafter, the Company refused to bargain with the Union on the ground that the certification was invalid since the line leaders and the inspector had been excluded from the unit. The Union filed a charge alleging that the Company's refusal violated Section 8(a)(5) of the Act, and a complaint issued (R. 69–72). At the hearing before the Trial Examiner, the Company did not seek to introduce any new evidence on the status of the line leaders and the inspector, but contended that the findings made in the representation case on the line leaders were defective since they rested solely on the evidence adduced in the earlier unfair labor practice case, which was not part

of the record in the present proceeding (S.R. 11–14). The Trial Examiner concluded that the Board had properly taken official notice of its findings in the earlier unfair labor practice case on the supervisory status of the line leaders, that there was thus no procedural irregularity in the representation phase of the present proceeding, and that the Company's refusal to honor the certification violated Section 8(a)(5) (R. 10–14). The Board adopted the Trial Examiner's report, adding that (R. 8, n. 2):

> In finding in the representation proceeding that the line leaders were supervisors, the Board did not treat the determination made in Case No. 14–CA–2255, 120 NLRB 980 as to the status of the line leaders as *res judicata* on that issue. The Board did consider the earlier determination but then stated:
>
> > * * * the record in the instant case indicates that the line leaders continue to possess supervisory duties and responsibilities previously found by the Board.

The Board accordingly entered an order requiring the Company to bargain with the Union (R. 8).

The court of appeals enforced the Board's order (Pet. 1a–6a). It held that the "Board, in determining, in the representation proceeding, whether the 'line leaders' were supervisors, as they had been found to be in the first unfair labor practice proceeding, was not required to ignore the evidence in that proceeding relative to the status of the 'line leaders' and the inferences fairly to be drawn from such evidence." "These several proceedings before the Board followed each other in logical sequence. They occurred during

the Union's campaign to organize respondent's plant. They constituted, in effect, one continuing controversy between the Union and the respondent." (Pet. 4a–5a.)

ARGUMENT

1. Petitioner's contention (Pet. 13–16) that it was improper for the Board to take official notice of and to consider the findings respecting the supervisory status of the Company's line leaders, which it made three months earlier in a prior proceeding involving the same parties, is clearly insubstantial and presents no issue warranting review by this Court. It is settled that an administrative agency may notice and consider its own record of prior interrelated litigation between the same parties. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 530; *Market Street Ry. Co.* v. *Railroad Commission*, 324 U.S. 548, 561–562. There is ground for complaint only if the party affected can show "substantial prejudice" in that he was not afforded an opportunity to meet the material considered by the agency. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93; *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 528. See also Administrative Procedure Act, Section 7(d) (5 U.S.C. 1006 (d)); 2 Davis, *Administrative Law Treatise* (1958), § 15.12.

In the instant case, the Company had ample opportunity to contest the application of Board's determination in Case No. 14–CA–2255 to the present case, for the Union moved *at the hearing* in the representation case that official notice be taken of the Board's prior determination. Not only did the Com-

pany fail to object to the Union's motion, but its attorney even urged the Board to read the entire transcript in the earlier case, expressing confidence that the Board would reach a different conclusion. Moreover, at the hearing in the representation proceeding the Company was in fact afforded an opportunity, and utilized it, to present additional evidence on the status of its line leaders. Finally, the Board decision in this case did not rest solely on the record of the earlier unfair labor practice case. The Board, after reciting the evidence in the prior case, went on to find that the conclusion reached there was independently supported by the evidence adduced in this case (*supra*, pp. 4, 6).

2. Petitioners' remaining contentions (Pet. 16-17) likewise present no issue warranting review by this Court. The question whether the Company's line leaders are "supervisors" within the meaning of Section 2(11) of the Act [5] is essentially a question of fact involving the particular circumstances of this case, and is governed by the "substantial evidence" standard of review. See *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504. This Court will ordinarily not review such questions. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–

[5] Section 2(11) defines the term "supervisor" as:

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

491. In any event, the factors noted by the Board (R. 76–77, n. 2) make it clear that there was ample basis for the Board's conclusion that the line leaders possessed the indicia of supervisory status enumerated in Section 2(11) of the Act. See *National Labor Relations Board* v. *Mt. Clemens Metal Products Co.*, 287 F. 2d 790, 791 (C.A. 6); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 79 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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